

# Review of Enforcement Measures

## Enforcement of National Implementing Legislation

As of June 2000, the implementing legislation of most parties to the Convention, other than the United States, has not been in effect for a sufficient time to gauge the effectiveness of the parties' enforcement efforts. We are not aware of any prosecution by another party to the Convention for payments to foreign public officials.

In the United States, FCPA investigations of the bribery of foreign public officials and prosecutions are subject to the same rules and principles as govern any federal criminal or civil investigation. To ensure that uniform and consistent prosecutorial decisions are made in this particular area, all criminal investigations under the FCPA are supervised by the Criminal Division of the Department of Justice.

In the twenty-three years since the passage of the FCPA, the Department of Justice has brought approxi-

mately thirty criminal prosecutions<sup>1</sup> and six civil injunctive actions. In addition, the SEC has brought several civil enforcement actions against issuers for violations of the antibribery provisions and numerous actions for violations of the books and records provisions of the FCPA. In the period January 1999 to June 2000, the Justice Department brought one criminal FCPA prosecution, resulting in a fine and home confinement for one defendant, and one civil injunctive action, resulting in a consent order and a \$400,000 fine.

The Department of Justice has also provided assistance to American businesses who were in the process of undertaking international business transactions. Since 1980, the Department has issued thirty-four opinions in response to requests from American businesses stating whether it would take enforcement action if the requestors proceeded with actual proposed transactions.

## U.S. Efforts to Promote Public Awareness

For many years prior to the adoption of the Convention, the U.S. government sought to educate the business community and the general public about international bribery and the FCPA. As a result, U.S. companies engaged in international trade are generally aware of the requirements of U.S. law. Since U.S. ratification of the Convention and the passage of the IAFCA, the Clinton Administration has

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<sup>1</sup>In addition, there have been several cases where the absence of dual criminality has made it impossible to use foreign evidence obtained under a mutual legal assistance treaty in a FCPA prosecution, and charges were therefore brought under other federal criminal statutes.

stepped up efforts to raise public awareness of U.S. policy on bribery and initiatives to eliminate bribery in the international marketplace.

Over the past two years, Secretary of Commerce William Daley and other senior Commerce officials, including General Counsel Andrew Pincus and Under Secretary David Aaron, have repeatedly spoken out against international bribery to business audiences and urged support for the Convention. Since taking on the position of Acting Under Secretary for International Trade in April 2000, Robert LaRussa has also raised the Convention and antibribery issues in meetings with a number of senior officials of signatory governments.

The secretaries of State and the Treasury and senior officials in both agencies have been supportive as well. At the 2000 World Economic Forum in Davos, Switzerland, Secretary of State Madeleine Albright urged signatory governments to send a clear message against bribery and enact strong implementing legislation that fully meets the requirements of the Convention. In February 2000, Under Secretary of State Alan Larson used the occasion of the first anniversary of the Convention's coming into force to hold a press conference at which he reviewed progress on implementing the antibribery agreement and pressed all signatories to bring it into effect. Under Secretary Larson also raised implementation with his G-8 counterparts during preparations for the Summit of the Eight in Japan. At the IMF/World Bank joint meetings in April 2000, Treasury Secretary Lawrence Summers highlighted the importance of the Convention during bilateral meetings with other ministers attending the sessions.

Officials of the Commerce, State, and Justice Departments are also in regular contact with business representatives to brief them on new developments relating to antibribery issues and discuss problems they encounter in their operations. In addition, as part of a vigorous outreach program, the three departments provide on their Internet websites detailed information on the Convention, relevant U.S. laws, and the wide range of U.S. international activities to combat bribery. In May 2000, the State Department, in cooperation with the Commerce and Justice departments, also published a brochure titled "Fighting Global Corruption: Business Risk Management" that contains information about the benefits of good governance and strong corporate antibribery policies, the requirements of U.S. law and the Convention, and the various international initiatives underway to combat business corruption. The brochure is being made available to U.S. companies and business associations. (See Chapter 8 for more information on U.S. government outreach initiatives on bribery and corruption.)

## Efforts of Other Signatories

Efforts to raise public awareness about business corruption and the importance of the Convention vary widely among other signatory countries. The United States has the most extensive public outreach program of any signatory to the Convention. Several other countries are also taking useful initiatives to raise public awareness on the need to fight corruption, both at home and abroad, and have expanded their activities over the past year. Yet in many signatory countries, including important economies such as Belgium, Italy, Japan, the Netherlands, and Spain, there has been relatively little activity on publicizing the Convention or encouraging a public dialogue on unethical business practices in international trade.

Governments have sought to draw attention to the Convention and the problems of business corruption in a variety of ways, for example, through speeches by high-level officials, publications, well publicized anticorruption programs, and the appointment of an anticorruption spokesperson. Nongovernmental organizations are also playing an important role in raising public awareness of corruption and the need for effective remedies. Transparency International, a nongovernmental organization committed to promoting good governance and fighting bribery and corruption, has been particularly active. Working with a network of representatives and supporters in seventy-seven countries around the world, Transparency International has sought to educate governments and societies on the importance of fighting corruption and enacting effective legislation. Other private national organizations, some founded just since the Convention came into effect, have also emerged to help promote public awareness of corruption and encourage public discussion of possible solutions.

According to reports from U.S. embassies and public sources of information, the following countries have undertaken notable activities to raise public awareness on corruption.

The government of **Australia** developed an extensive campaign to raise public awareness of its anticorruption policies. The Australian government has issued press releases and placed advertisements in trade publications to explain the Convention and government efforts to fight corruption. It has also organized seminars in Australia and overseas to brief Australian companies.

In **Bulgaria**, fifteen nongovernmental organizations have joined together to form Coalition 2000, an advocacy group devoted to fighting corruption. Coalition 2000 is developing an anticorruption action plan and publi-

cizing the Convention. It has its own Internet website with links to the OECD website and the text of the Convention. The Bulgarian government has endorsed and supported activities of Coalition 2000. Among South-east European countries participating in the Stability Pact, Bulgaria has taken the lead in promoting a new regional anticorruption initiative aimed at promoting trade and investment and improving the overall business climate. The government has posted the Stability Pact initiative on its Internet website and also publicized it at government press conferences.

**Canada's** Justice Department has published a booklet on the Convention and Canada's antibribery laws titled "The Corruption of Foreign Officials Act" that is being made available to the business community. The Justice, Foreign Affairs, and International Trade Ministries also prepare an annual report to Parliament on the implementation of the Convention. In addition to these government initiatives, several nongovernmental organizations, including Transparency International, the Canadian Bar Association, and the Canadian Association of Manufacturers and Exporters, are helping to raise public awareness by holding seminars on the Convention and related issues.

The government of the **Czech Republic** has organized a number of seminars since November 1999 to brief national and municipal officials on anticorruption legislation. Czech officials have also given numerous broadcast and print media interviews on corruption and bribery issues. In addition to these government initiatives, the Transparency International branch in the Czech Republic has conducted its own public information campaign, distributing posters and pamphlets that incorporate information on the Convention.

In **France**, senior officials have affirmed the government's determination to combat corruption in international trade and its support for the Convention, although we have yet to see the latter translated into final legislative action. The draft French implementing legislation, legislative history, and the parliamentary debates have been made publicly available on the French government's website, and publicly debated in numerous press reports.

We have received reports from our embassy of increased public awareness of bribery issues through greater media coverage. Over the past year, the government's anticorruption policies have also received increased attention as a result of the well publicized investigation of alleged bribes by a major French oil company. The French chapter of Transparency International has also been particularly active.

In **Germany**, public outrage over alleged improper donations to the Christian Democratic Union political party has served to raise awareness of bribery. The German government and business associations have been working together to publicize antibribery laws in seminars and newsletters. Increasingly, German companies are starting to develop internal procedures to promote compliance with the law. To encourage companies in that direction, the German government is now requiring all applicants for Hermes export credit guarantees to declare that financed transactions have been and will remain free of corruption.

**Korea** has seen a dramatic increase in national anti-corruption activities over the past year. President Kim Dae Jung established a presidential anticorruption commission to investigate corruption and make policy recommendations. In February 2000, President Kim personally inaugurated a new anticorruption website, named "Shinmungo," on which Korean citizens could report complaints about unfair treatment and public corruption. Under the leadership of Mayor Goh Kun, the city of Seoul has undertaken a high-profile anticorruption campaign, featuring a new online procurement information system that allows citizens to monitor the entire administrative process of government procurement and civil applications. Mayor Goh spoke out against public corruption and described Korea's new initiatives at the International Anti-Corruption Conference sponsored by Transparency International on October 14, 1999, in Durban, South Africa. In 1999, more than 800 civic groups also formed a new umbrella civic organization called the "Anticorruption National Solidarity" to mobilize public support against corruption and to serve as a clearing housing for complaints on corrupt practices.

In **Poland**, President Aleksandr Kwasniewski hosted an international conference on fighting corruption in March 1999. Deputy Prime Minister and Finance Minister Leszek Balcerowicz has actively supported the activities of nongovernmental organizations that are working for openness and integrity in government. Over the past year, the government has sought to encourage public discussion of the costs of bribery and the need to address the problem. At the request of Minister Balcerowicz, the World Bank prepared a study on bribery and corruption in Poland that was published in April 2000. Local nongovernmental organizations, including the Transparency International branch in Poland, have started projects to raise public awareness of corruption and improve the legal foundations for transparent governance. Poland has also accepted U.S. offers of technical assistance to help promote good governance practices.

The **Slovak Republic**, under the leadership of Prime Minister Mikulas Dzurinda, has called for a national program to fight corruption. Many high-level officials, including the Prime Minister and interior minister, have publicly condemned official bribery and pledged to take action against it. The government has organized several inter-ministerial conferences to discuss the problem. In 1999 the Transparency International branch in the Slovak Republic sponsored a conference on corruption and bribery at which the Convention was discussed. Transparency International also publishes a newsletter that provides information about the Convention and other anticorruption initiatives.

**Sweden** has been an active supporter of the Convention. Senior officials have spoken out against international corruption and publicly emphasized Sweden's willingness to expand the scope of its international cooperation to combat the problem. Over the past year, the Swedish government also appointed a senior official in the Ministry of Foreign Affairs, Ambassador Lennart Klackenberg, to serve as government spokesman on corruption and to help broaden public awareness. In December 1999, Ambassador Klackenberg released an interagency-approved report on the subject titled "The Fight Against International Corruption—Swedish Positions and Activities." In February 2000, Sweden's Minister for Trade, Leif Pagrotsky, co-hosted and addressed a colloquium on corruption in the arms trade, calling for a sustained and purposeful effort to address the problem.

In addition to the United States, twenty signatories to the Convention have posted their national implementing legislation or draft legislation on their government websites or the OECD Anticorruption Unit website: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Japan, Korea, the Netherlands, New Zealand, Norway, Poland, Spain, Sweden, and Switzerland. (See Appendix D for a list of websites.)

## Monitoring Process for the Convention

Monitoring is crucial for promoting effective implementation and enforcement of the Convention by signatory countries. The OECD has developed a comprehensive monitoring process that provides for input from the private sector and nongovernmental organizations. In addition to the OECD process, the U.S. government has its own intensive monitoring process, of which these annual reports to the Congress are an integral part. The United States has encouraged all signatories to participate fully in the OECD monitoring process and estab-

lish their own internal mechanisms for ensuring follow-through on the Convention by governments and the private sector. We have also stressed the importance of signatories devoting sufficient resources to ensure that the monitoring process is effective.

## OECD Monitoring

The OECD has established a rigorous process to monitor implementation and enforcement of the Convention and the 1997 Revised Recommendation. Our experience with the first stage of the process confirms that it is a serious undertaking that encourages parties to fulfill their obligations under the Convention. Evaluating implementation of the Convention is a challenging project given the diverse legal systems of signatory countries. The OECD review process seeks to accommodate these differences by focusing on the functional equivalence of measures and the identification of the strengths and weaknesses of the various approaches to implementation. Over the past year, the effectiveness of this process has been demonstrated by the willingness of several parties to correct weaknesses identified in their implementation and enforcement regimes after their legislation has undergone the review process.

## Framework for Monitoring

Article 12 of the Convention instructs the signatories to carry out a program of systematic follow-up to monitor and promote the full implementation of the Convention through the Working Group on Bribery. Guidance for the Working Group on monitoring and follow-up is provided in Section VIII of the Revised Recommendation of the Council on Combating Bribery in International Business Transactions (Revised Recommendation).

The key elements of the monitoring program are as follows:

- A self-evaluation provided in responses to the Working Group questionnaire, assessing implementation of the Convention and Revised Recommendation, including whether the country disallows tax deductibility of bribes to foreign public officials.
- A peer group evaluation wherein Working Group members have an opportunity to review the questionnaire and seek clarifications from representatives of the signatory government.
- A Working Group report providing an objective assessment of the progress of the participating country in implementing the Convention and Revised Recommendation.
- Regular provision of information to the public on the Working Group's programs and activities and on

implementation of the Convention and Revised Recommendation.

### **Operation of the Working Group**

To carry out its mandate, the Working Group agreed at its July 1998 meeting to certain modalities concerning the system of self-evaluation and peer group evaluation provided for in the Convention and Revised Recommendation. These modalities are summarized below and are also available on the OECD's public website at <http://www.oecd.org/daf/nocorruption/selfe.htm>.

The monitoring process has been divided into two stages, an implementation phase (Phase I) and an enforcement phase (Phase II). The objective of Phase I is to evaluate whether a party's implementing legislation meets the standards set by the Convention and the Revised Recommendation. The objective of Phase II is to study and assess the structures and methods of enforcement put in place by countries to enforce the application of those laws.

Phase I began in the latter part of 1998 with the distribution of a questionnaire to signatories soliciting information on how their respective laws and legal systems implement the Convention and the Revised Recommendation. The Working Group was instructed to report on the results of the Phase I review to the OECD Ministers at their annual meeting to be held on June 26–27, 2000. An ad hoc subgroup of the Working Group is now developing procedures and questionnaires for the start-up of Phase II.

The Phase I questionnaire contained a comprehensive list of questions on how parties intend to fulfill their obligations under the Convention and the Revised Recommendation. Countries were asked, among other things, to:

- Provide the dates on which the Convention was signed and ratified, necessary implementing legislation was enacted, and the Convention entered into force.
- Review how each of the substantive provisions of the Convention, from the elements of the offense (Article 1) to extradition (Article 10), is implemented.
- Explain their laws and policies regarding the tax deductibility of bribes, accounting requirements, external audit and internal company controls, public procurement, and international cooperation.

To encourage a candid and frank discussion among the Working Group members in evaluating each other's laws, the Working Group agreed that questionnaire responses would be treated as confidential.

The questionnaire responses were circulated to participants in the Working Group and served as the primary basis of analysis for each country examined. At

the onset of the monitoring process, each signatory provided the OECD secretariat with the names of two experts to serve as lead examiners in monitoring implementation. The secretariat thereafter developed a timetable for countries to be examined. A team of lead examiners drawn from two states conducted the examination with the assistance of the secretariat.

At the first monitoring session, held April 12–14, 1999, the Working Group examined the implementing legislation of the United States, Norway, and Germany. Since then, the legislation of additional signatories has been reviewed: Finland, Bulgaria, Greece, Canada, and Korea in July 1999; Japan, Hungary, Belgium, Sweden, and Iceland in October 1999; Australia, Austria, and the United Kingdom in December 1999; Mexico, the Slovak Republic, and Switzerland in February 2000; and the Czech Republic and Spain in March 2000.

Several weeks before each Working Group meeting to examine implementing legislation, the OECD secretariat prepares a draft analysis and questions based on the country's responses to the Phase I questionnaire. The designated lead examiners also prepare advance written questions. The examined country then provides written responses to the secretariat's analysis and to the questions posed. At the beginning of each segment of the monitoring meeting, the designated lead examiners and the examined country have the opportunity to make general opening remarks. The lead examiners begin the questioning and discussion by raising issues that were unresolved during the written exchange stage. A discussion and consultation within the Working Group follows. The lead examiners and the secretariat, in consultation with the examined country, then prepare a summary report and a set of recommendations that must be approved by the Working Group.

Working Group members have agreed to keep the summaries and recommendations confidential until the OECD ministers have approved publication of the report. When the OECD releases the report, a link will be provided on the Department of Commerce's website (<http://www.mac.doc.gov/tcc/index.html>). The OECD Council is expected to approve the release at the ministerial meeting on June 26–27, 2000.

Although Working Group proceedings are confidential, the monitoring process still provides ample opportunities for input by the private sector and nongovernmental organizations. Transparency International has submitted its own assessment of the implementing legislation of a number of the examined countries. In addition, the American Bar Association has provided input with regard to the Foreign Corrupt Practices Act (FCPA)

and on how the FCPA had affected the behavior of U.S. companies.

The Working Group also encourages private sector input through other channels. It has had a number of consultations on the Convention with the Business and Industry Advisory Committee and the Trade Union Advisory Committee (two officially recognized OECD advisory bodies), Transparency International, the International Chamber of Commerce, and international bar groups. Prior to Working Group meetings, U.S. delegates consult with representatives of the private sector and nongovernmental organizations to identify issues of particular concern. The United States will continue to advocate broad public access to information on implementation and enforcement of the Convention.

The Phase I process has proven to be highly useful for monitoring implementation of the Convention. The process is facilitating an open exchange of information among Working Group members and providing opportunities for the private sector to present its views and analysis for consideration.

The timing of Phase II monitoring of enforcement is still under review. Some countries have resisted the initiation of Phase II until more signatories have enacted implementing legislation and brought the Convention in force. The United States has supported the initiation of Phase II activities before the end of 2000 as originally scheduled. We are concerned that implementation of the Convention may lose momentum if Phase II does not begin soon. To help start the process and provide a benchmark for subsequent reviews, the United States has offered to be the first country to have its enforcement regime examined.

Review of enforcement is an important part of U.S. government monitoring of the Convention. Future reports should provide more detailed information on enforcement activities as governments begin to confront cases involving bribery of foreign public officials and a record of enforcement action develops. In addition, the U.S. government will also, where appropriate, apprise other governments of information relating to the bribery of foreign public officials by persons falling within their jurisdiction.

## **Monitoring of the Convention by the U.S. Government**

The U.S. government is devoting considerable resources to monitoring implementation of the Convention. At the Commerce Department, monitoring compliance with the Convention—and international commer-

cial agreements generally—has a high priority because, as Secretary Daley has repeatedly emphasized, “Compliance is the true litmus test for what we achieve in our negotiations and trade practices.” Other U.S. agencies are also actively involved and making important contributions. The Commerce, State, Justice, and Treasury departments and the staff of the SEC are working as an interagency team to monitor implementation and enforcement of the Convention. Each agency brings its own expertise and has a valuable role to play.

Participation in the OECD Working Group on Bribery is an important part of the U.S. government monitoring process. As part of that process, attorneys in the Commerce Department's Office of General Counsel, the State Department Legal Adviser's Office, and the Justice Department's Criminal Division make an in-depth review of each party's implementing legislation.

Preparation of these annual reports to Congress also helps to strengthen the monitoring process within the U.S. government. To fulfill the IAFCA's reporting requirement, the Commerce Department organizes an interagency task force early in the year to coordinate work on the Congressional report and review ongoing initiatives to monitor the Convention over the longer term. U.S. embassies in signatory countries assist in this process by obtaining information on host government laws and making assessments of progress in implementing the Convention, taking into account the views of both government officials and private sector representatives. These diplomatic reports provide valuable information for our analysis.

The U.S. government has welcomed private sector input in monitoring the Convention. As indicated in Chapter 8, U.S. officials have had numerous contacts with the business community and nongovernmental organizations on the Convention. We have highly valued their assessments and the expertise that they can bring to bear on implementation issues in specific countries.

In the year ahead, the Department of Commerce, in close collaboration with the State and Justice departments and other responsible agencies, plans to continue its vigorous monitoring of the Convention. The following specific actions will be taken.

- The Department of Commerce will continue to ensure that there is an integrated approach to monitoring that includes legal assessments of implementing legislation, outreach to the private sector, appropriate diplomatic initiatives, and timely analysis of the latest developments on international bribery and corruption.
- The Trade Compliance Center, which has responsibility in the Commerce Department for monitor-

ing compliance with international trade agreements with the United States, and the Office of General Counsel will continue to give heightened attention to bribery in international business transactions and implementation of the Convention. This effort will include strong outreach to the U.S. business community and nongovernmental organizations. The Trade Compliance Center will, in close cooperation with the Office of General Counsel and interested U.S. agencies, also continue to oversee preparation of the annual reports to Congress required by the IAFCA.

- Enforcement of implementing legislation is critical to ensuring that the Convention is effective in deterring the bribery of foreign public officials in international transactions. When information is received relating to acts of bribery that may fall within the jurisdiction of other parties to the Convention, the information will be forwarded, as appropriate, to national authorities for action.

- The Department of State will continue to use its Advisory Committee on International Economic Policy (ACIEP) to obtain private sector views concerning the Convention and to keep nongovernmental organizations abreast of progress in the fight against corruption. Over the past year, the ACIEP discussed implementation of the Convention at three of its meetings.

- The Departments of Commerce and State, working with other U.S. agencies, will support active diplomatic and public affairs efforts to promote the goals of the Convention. Senior officials will continue to include points on the Convention in their meetings with foreign government officials and speeches to U.S. and foreign audiences. U.S. diplomatic missions will be kept informed of current developments on the Convention so they can effectively participate in the monitoring process and engage foreign governments in a dialogue on key bribery-related issues.

The United States has the most intensive monitoring program of any of the signatory countries. It is transparent and open to input from the private sector and nongovernmental organizations. The U.S. government will continue giving a high priority to monitoring implementation of the Convention so that U.S. businesses can fully realize the benefits of this important international agreement.

